NO. 2643.

In the United States Circuit Court of Appeals For the Ninth Circuit

HON. WILLIAM B. GILBERT, Circuit Judge,
HON. ERSKINE M. ROSS, Circuit Judge,
HON. WILLIAM H. HUNT, Circuit Judge.

SOUTHERN PACIFIC COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE CALIFORNIA ADJUSTMENT COMPANY,
a Corporation,
Defendant in Error.

SECOND ORAL ARGUMENT FOR PLAINTIFF IN ERROR

SUPPLEMENTAL BRIEF

COPY OF DECISION CALIFORNIA RAILROAD COMMISSION IN PHOENIX MILLING CO. V. SOUTHERN PACIFIC CO.

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SECOND DIVISION.

HENLEY C. BOOTH,
GEORGE D. SQUIRES,
FRANK B. AUSTIN,
Attorneys for Plaintiff in Error.

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SECOND ORAL ARGUMENT
WEDNESDAY, MAY 24, 1916.

COUNSEL APPEARING

For Plaintiff in Error: HENRY C. BOOTH, Esq., GEORGE D. SQUIRES, Esq., and FRANK B. AUSTIN, Esq.

For Defendant in Error: HOEFLER, COOK, HARWOOD and MORRIS.

ARGUMENT OF HENLEY C. BOOTH, ESQ.

(Note: Some quotations are inserted herein which were not read to the court on oral argument.)

MR. BOOTH: May it please the Court, this case was argued last December, and the Court has made an order that the matter be re-argued and re-submitted. His Honor, Judge Gilbert, was kind enough to tell Mr. Harwood and me when we called upon him the other day that the Court did not care for any argument on the first class of cases involved in this proceeding; that is to say, those cases in which the violation of the long and short haul clause of the California Constitution was alleged to have occurred before October 10, 1911.

JUDGE GILBERT: It has occurred to me since that Judge Hunt did not sit in that case, and that you had better submit the whole case; you may submit it on briefs.

MR. BOOTH: As to the first class of cases I am willng to submit the case on the briefs on file, with the exception of some of the authorities which have been published since, which I desire to cite to the Court, and to have added to the briefs.

JUDGE GILBERT: Very well.

MR. BOOTH: The case divides itself distinctly into two classes of cases. The first class is susceptible tible of no subdivision. The second class of cases is susceptible of more or less subdivision. Both of the

classes of cases arise under the long and short haul clause of the California Constitution. The first class of cases arises under that clause as it was adopted in 1879, and as it remained unchanged until October 10, 1911. The second class of cases arises under the same section of the California Constitution as it was amended on October 10, 1911.

I fear that the length of the record in this case, and the perhaps necessary length of the briefs has somewhat obscured the points upon which I desire to make whatever re-argument that might be proper at this time. As to the first class of cases——

JUDGE HUNT. (Intg.): What's the case? Tell me in a few words what the question is.

MR. BOOTH: The case comprises a number of causes of action assigned to the defendant in error, the California Adjustment Company, claimng that its assignors had been charged more for the lesser than for the greater distance on the same line, and in the same direction for rail transportaition in California. That, in brief, is the case. It is somewhat analogous, to cases coming under the fourth section of the Interstate Commerce Act, prohibiting charging more for the lesser than for the greater distance.

JUDGE HUNT: What is the difference between the provisions of the Constitution of this State and the Interstate Commerce Act?

Mr. Booth: The difference between the I. C. Act and the California clause, as it was amended on October 10, 1911, is not so great. But as the clause stood from 1879 to October 10, 1911, it was provided in Article 12, Section 21 of the California Constitution,——

Judge Hunt: I will find that in your brief, will I not?

Mr. Booth: It s on page 4 of the brief of the plaintiff in error. The amendment to the Calfornia Constitution, adopted October 10, 1911, is on page 6 of the brief of the plaintiff in error.

The essential difference, however, between the amendment to the California Constitution and the fourth section of the Interstate Commerce Act is that in the amendment to the California Constitution there is no six months suspension, as there is in the Interstate Commerce Commission Act, section four.

We argued as to the first class of cases, those which arise under the Constitution of 1879, that first, the Constitution was invalid because in terms it attempted to regulate interstate commerce. We argued, second,that even if it were not invalid on that ground, it was invalid because it contains no relieving clause; in other words, that it was an inflexible measure established by the Constitution which gave the carriers no option, which gave the Railroad Commission no option, and which did not regard the dis-

similarities of conditions as between the haul to the more distant point and the haul to the less distant point. I think those points are quite fully covered in the briefs of counsel for both sides; and not anticipating that His Honor, Judge Hunt, would be here and desire light on the first branch of the case, I did not prepare myself to make any re-argument on the first class of cases, except that I do desire to cite to your Honors a quite recent decision of the Supreme Court of Wisconsin. It is the case of Chicago, Milwaukee & St. Paul Railway Company v. Rock County Sugar Company, 156 Northwestern, at page 607, decided February 22, 1916. It is in the advance sheets of March 24, 1916. In that case the legislature of the state of Wisconsin had passed a statute in which it is attempted to regulate the movement of cars and the unloading of cars, in short, a demurrage statute. The statute did not in terms, as does, as we claim, the original section of the California Constitution, attempt to regulate interstate commerce. It merely said that the provisions of the statute should apply to carload freight from point of shipment to point of destination.

I will not take the time of the Court to read the opinion, because it is quite lengthy, but, from our standpoint, at least, it is quite an able analysis of a statute or constitutional provision which attempts to blend the regulation of interstate com-

merce with that regulation which the legislature of the state has the power to enact. The Court says:

"Where the plain meaning of the statute is "that it shall apply to those matters over which the "state Legislature has jursdiction, and these sub-"jects are so interrelated that it is reasonbly appar-"ent that the Legislature would not have attempted "the regulation of one alone in the manner and to "the extent specified in the statute, then the statute, "being invalid in its main purpose, must be held "wholly nugatory." And it cites a number of United States Supreme Court decisions and a number of state decisions.

There is one sentence here that is so pertinent in this regard, that I cannot help calling the Court's specific attention to it. The Court said: "Here, if "we find the statute in conflict with a paramount "rule of law, we vindicate and uphold the latter by "refusing to uphold the former, and this necessary "result is sometimes loosely spoken of as 'declaring " 'the statute unconstitutional.' The Federal govern-"ment is the paramount authority in the regulation "of interstate commerce." Then they refer to the familiar line of decisions holding that the Federal government has reached out its hands to include all services in connection with the delivery and handling of property transported interstate.

So much, if your Honor please, on the first branch of the case. As to the specific case, as I say,

I am quite willing to submit the case of the plantiff in error on our brief. Indeed, I can hardly do anything else in the limited time I have.

There is, however, one point which pervades this case, both as to the first class of cases and as to the second class of cases, and that is the question as to whether it is essential for the Plaintiff in Error in the court below to have alleged and proved damage to its assignors. I think that that question is as well treated in our briefs as I wish to do, and therefore I desire to add little more on that subject than to remind the court that that question applies to both classes of cases irrespective of any other subdivision, and that it is entirely apparent from the record that there was no effort made either to allege or to prove that the plaintiff, or the assignors of the plaintiff had been damaged.

I merely desire on this point to submit for the consideration of the court some additional authorities which have come to my attention since the argument here in December. The plaintiff has been proceding in this action on the theory that proof of violation of the long and short haul clause establishes damage in favor of a shipper, and establishes the amount of such damages in a sum equal to the difference between the higher rate which was paid to an intermediate point and the lower rate contemporaneously in effect to more distant points.

In Parsons vs. Chicago & Northwestern, 167 U. S. 447, the Court, referring to the Interstate Commerce Act, said "Before any party can recover under the Act he must show, not merely the wrong of the carrier, but that that wrong has in fact operated to his injury."

In Pennsylvania Ry. vs. International Coal Co., 230 U. S. 200, the Court said:

> "Congress had not then and has not since given any indication of an intent that persons not injured might nevertheless recover what so-called damages would really be, a penalty in addition to the penalty payable to the government. Proof of the damages resulting from the wrongful act of the carrier must be by such evidentary fact as would be required to sustain a recovery before a court of law. Mere proof of specified shipments made and the freight paid and the amount for which reparation is sought does not make out a prima facie case. Something more is necessary. The plaintiff must show how the discrimination found to exist affected him to his damage. In other words he must establish the fact of his damage, as well as the amount of damage he claims."

And again in the Parsons Case, which has just been referred to:

"We remark again that there is no averment in this petition that the rates charged to and paid by the plaintiff were, in themselves, unreasonable; that is, it is not claimed that the rates for shipping corn from points in Iowa to Chicago were not fair and reasonable charges for the services rendered. The burden of the complaint is the partiality and favoritism shown to places and shippers in Nebraska. The plaintiff is not seeking to recover money which inequitably and without full value given has been taken from him. He is only seeking to recover money which he alleges is due, not because of any unreasonable charge, but on account of the wrongful conduct of the defendant.

Again, his cause of action is based entirely on a statute, and to enforce what in its nature is a penalty. Suppose that the officials of the defendant company had charged the plaintiff only a reasonable rate for his personal transportation from his home in Iowa to Chicago, and at the same time had, without any just occasion therefor, given to his neighbor across the street free transportation, thus being guilty of an act of favoritism and partiality—an act which tended to diminish the receipts of the railroad company, and to that extent the dividends to its stockholders—such partiality on their part would not, in the absence of a statute, have en-

titled the plaintiff to maintain an action for the recovery of the fare which he had paid, and thus to reduct still further the dividends to the stockholders. So, but for the provisions of the Interstate Commerce Act, the plaintiff could not recover on account of his shipments to Chicago, if only a reasonable rate was charged therefor, no matter though it appeared that of the railway officials shippers in Nebraska had been given a lesser rate.

It was, among other reasons, in order to avoid the public injury which had sprung from such conduct on the part of railway officials that the Interstate Commerce Act was passed, and violations of its provisions were subjected to penalties of one kind or another. But it is familiar law that one who is seeking to recover a penalty is bound by the rule of strict proof. Before, therefore, the plaintiff can recover of this defendant for alleged violations of the Interstate Commerce Act he must make a case showing not by way of inference but clearly and directly such violations. No violation of statute is to be presumed."

That a mere violation of the long and short haul clause without anything more does not establish a claim for damages has uniformly been held by the Interstate Commerce Commission. Thus, in the

case of Topeka, etc., v. St. Louis, etc., 13 ICC 620, at page 627, referring to the various claims of the plintiff, the Commission said:

> "Third. That section 4 of the Act is violated in that a lesser rate is charged to Burlington, Iowa, than to Kansas City, an intermediate point, over a through route.
>
> The complaint here is that bananas move from New Orleans through Kansas City to Burlington, Iowa and that the Kansas City rate is higher than the Burlington. There is a joint rate quoted in the tariffs to Burlington via Kansas City, but no bananas seem ever to have moved over that route. It is nothing more than a paper rate, bananas destined for Burlington moving through St. Louis."

The complaint was dismissed.

In the case of Nix & Co. vs. Southern Ry., 31 ICC 145, which involved a violation of the long and short haul clause of the Interstate Commerce Act, as amended in 1910, it appeared that the carriers had not protected themselves by any application to the Commission for leave to deviate from the long and short haule clause. The Commission, page 149, says:

> "The interstate carriers had made no application to the Commission for authority to publish rates in contravention of the long and short haul rule, and stated that it was through over-

sight that they were so adjusted. As the Fourth Section provides that it shall be unlawful for a carrier to charge more for the shorter than for the longer haul over the same line, complainants seek reparation on shipments to New York on the basis of the lower rate contemporaneously in effect from and to the more distant point. While the records show that complainants shipped to Boston by the Norfolk & Western in 1911, and via the Chesapeake & Ohio in 1910, it does not appear that the shipments were made from Lynchburg to New York, or from points on the Chesapeake & Ohio and points on the Southern Railway to Boston during the time that the higher rates from and to the intermediate points were in effect. There is no proof, therefore, that complainants have been in anywise damaged by the maintenance of the lower rates from and to the more distant points. The mere fact that the rates charged were maintained in violation of the Fourth Section of the Act, while it may make the carriers subject to a prosecution under the Act for the recovery by the Government of a penalty prescribed for violation thereof, does not in the absence of proof of damage to the shipper afford a basis for an award of reparation in his favor."

Again in the case of Goodwin vs. Ry. Co. 21 ICC. 25, there was an instance where the through rate exceeded the sum of the local rates in violation of another part of section 4 of the interstate act, and the Commission said:

> "Where the complainant makes no charge that the joint rate is unreasonable, but merely claims reparation upon the theory that the shipments were or could have been recognized, as it is claimed in this case they were, the Commission will not award reparation."

In the case of Kellogg, etc., vs. Michigan Central, 24 ICC. 604, the Commission held that there was no warrant for the violation of the Fourth Section, but at the same time said they did not regard the case as one for reparation, and none would be awarded. In saying that the case was not one for reparation, they did not mean that no reparation was sought in the complaint, because on page 604, it is distinctly stated that reparation was asked.

In the case of Stewart vs. St. Louis, 29 ICC. 120, there was a violation of the long and short haul clause, and reparation was asked. The Commission said:

> "There is no such definite proof of record respecting the damage, if any, suffered by the complainants on account of the lower rate from Rayville as to warrant an award of reparation."

The Commission of this state in Phoenix Milling Co. vs. SP., Vol. VII of the Opinions of the Commission, at page 677, hereinafter referred to, had before it a case where the Southern Pacific had been charging 16c per hundred pounds from San Francisco to Sacramento, and only 13c from San Francisco to Perkins, a point beyond Sacramento. Comr.. Loveland said in the opinion at page 683:

> "I have no hesitation in declaring my conviction that reparation should be awarded where complainants can show that the application of rates violative of the long and short haul rule has resulted in damage to complainants. I do not believe that the carriers should be required to pay reparation to a complainant who has not been dameged, when it is evident that such reparation cannot be passed on to those who are entitled to it, but rather that complainant will itvas additional profit."

Before again referring to that decision I desire to refer your honors to the opinion of the Supreme Court of California in Pacific Telephone Company vs. Eshleman, 166 Cal. 640, where the powers of this Commission are considered and defined by the Supreme Court of the State of California. I take it that the decision within certain well understood limits will be regarded as controlling in the determination of this case. I am reading from page

860. The opinion is by Justice Henshaw and concurred in practically by the whole court.

> "As the Public Utilities Act is here for the first time before this court, as the question is thus fairly within this case, and as to ignore it is but to necessitate its consideration in subsequent litigation, it is proper to say that we held the powers and functions of the railroad commissioners in many instances, and in the present one, to be of a highly judicial nature." (That was where they had compelled connections between telephone companies.) That judicial powers were with deliberation vested in the commission the language of the constitution and of the legislative enactments following the constitution leave no doubt."

Then they go on to consider the powers which were vested in the commission. I want to come back to this case in a moment and refer to it in connection with another matter, but it seems clear that in the light of this decision the railroad commission of California is vested with a combination, so to speak, of administrative and judicial powers; that when they act in a matter touched by their judicial functions their decisions, I take it, are entitled to the same amount of weight as any corresponding court of California, and I think, your honors, when you come to examine the case, if you

have not already examined it, you will conclude that the powers of the commission are almost equal, at least, to those of the Supreme Court of this State.

In the case of Phoenix Milling Company vs. Southern Pacific, reported in Volume VII of the Commission's opinions, at page 677, of the bound volume of California Railroad Commission decisions, decided July 23, 1915 (copy printed at end hereof for convenient reference), the Commission found that there was a discriminatory rate in effect and a rate violative of the long and short haul clause of the constitution as amended, yet the Commissioner writing the opinion says:

> "I have no hesitation in declaring my conviction that reparation should be awarded where complainant can show that the application of rates violative of the long and short haul rule has resulted in damage to the complainant. I do not believe that the carriers should be required to make reparation to a complainant who has not been damaged, when it is evident that such reparation cannot be passed on to those who are entitled to it, but rather that complainant will keep it as additional proof.

In the case at bar practically all the complainants are mercantile firms who have passed on whatever difference there is in the cost of their wares

and goods, and will naturally absorb whatever judgment they may get in this case. Then the Commissioner goes on further to say:

> "There may be instances where complainants will be able to show that their selling prices, in cases of this kind, were not based upon cost and carriage, but were directly affected by competition from points enjoying rates violative of the long and short haul rule. In such cases it may be possible to show damage and that reparation should be awarded. In the case at bar no testimony was offered to show that the rate from San Francisco to Perkins, discriminatory as it clearly was when compared with the rate from San Francisco to Sacramento, and violating the long and short haul rule as it did, had any effect upon the price made by complainant in sellng his merchandise to customers in Perkns, and it is therefore fair to assume that complainant based his selling price upon cost and carriage and made his profit, in which event reparation, if due to any one, is due to the people to whom complainant sold his wares and they, in turn, in equity should pass it on to those to whom they sold the merchandise. Such is, of course, impossible, and the state is put to the expense of putting the machinery of this Commission in motion to collect petty reparation from the car-

riers who are not entitled to it, or see that it is paid to shippers as clearly not entitled to it, often under circumstances which indicate that such claims for reparation would never have been filed had it not been for the activities of claim agents who usually receive 50 per cent of the amount recovered, while the consumer, to whom the reparation is due in the last analysis, gets nothing. I do not believe that such was the aim or intent of the law. Undue discrimination must be removed wherever and whenever found; deviation from the long and short haul rule must be justified or discontinued; reparation should be awarded where damage is shown, but I do not believe the time of this Commission should be occupied to the neglect of more important matters in helpng to collect reparation for people not entitled to it."

So much for that point which we argue more elaborately in the brief that the failure of the plaintiff in error to allege and prove that its assignors had been damaged by the collection of this rate is fatal in this case.

Now, if the court please, I want to come to the second branch of the case, and that is the class of cases that arose under the amended section of the California Constitution as it was amended and took effect on October 10, 1911. This is a peculiar piece

of legislation. I think it is entirely competent for a constiutional provision to swallow a statute whole, so to speak, but it is a most unusual thing for it to do so. In Article 12, Section 22 of the Constitution, as amended in 1911, quoted on page 6 of the brief of the plaintiff in error, there is first provided in section 21 a long and short haul clause very similar to that of the Interstate Commerce Act, save that it does not continue expressly existing rates in force pending an application to the commission, as the amendment to the Interstate Commerce Act did. It does, however, provide, that the railroad commission may in special cases after investigation authorize a company to charge less for a longer than for a shorter distance. In Section 22, however, it states that no provision of this constitution shall be construed as a limitation upon the authority of the Legslature to confer upon the railroad commission additional powers of the same kind, or different from those conferred herein which are not inconsistent with the powers conferred upon the railroad commission in this constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this constitution.

When the Supreme Court of California came to consider that delegation of power to the Legislature to amend the constitution by Legislative act,—that is practically what it amounts to,—in this same case

I have cited, Pacific Telephone Company vs. Eshleman, 166 Cal.—I am reading from page 654, they quote the section I have just read, and they say:

> "There is the fullest possible grant of authority, to confer all kinds of additional powers, with the sole limitation that whatever additional powers may be vested by the legislature in the commission shall not be inconsistent with the constitutional powers conferred; that this means and can only mean that the legislature may not curtail any of the powers vested by the constitution in the railroad commission, but that the legislative authority, to confer any kind of additional powers is, and is expressly declared to be, 'plenary.' "

Coming then to the very next paragraph in the section of the constitution, we find that section takes the then existing Act of the Legislature called the Eshleman Act, which took effect in February, 1910, and to use an inelegent expresson, "swallows it whole." It says:

> "The provisions of this section shall not be construed to repeal in whole or inpart any existing law not inconsistent herewith, and the railroad commission Act of this State, approved February 10, 1911, shall be construed with reference to this constitutional provision, and any other constitutional provision becoming operat-

ive concurrently herewith, and said Act shall have the same force and effect as if the same had been passed after the adoption of this provision to the constitution, and all other Acts adopted concurrently herewith."

Now, we turn to the Eshleman Act, which is Chapter 20 of the California Statutes of 1911, and we find there provisions which I think are in point here. First, section 15, which says that the commission shall have power, and it shall be its duty to establish rates of charges for the transportation of freight and passengers. We find next the circumstances under which the commission must give a hearing on the establishment of rates and charges, and that is found in the last paragraph of section 18, and it is the only provision in that Act for a hearing with respect to the establishment of rates. It says:

"The commission may at any time abolish, alter or in any manner amend any rate or classification upon notice and hearing."

In other words, in one section the commission is told to establish rates, and in the next section, in effect, it is said "you cannot alter, or abolish or in any manner amend any rates without giving the carrier a hearing."

Then we find, still regarding this Eshleman Act as a part of the constitution, in the beginning of section 18, "*all rates of charges for the transporta-*

ton of passengers and freight, and all classifications established by the commission shall remain in effect until changed by the commission. A substantial compliance by the commission with the requirements of this Act shall be sufficient to give effect to all the classifications, etc., and none of them shall be declared inoperative because of any ommission of a technical or clerical character in the establshment of the record or publication of the same."

In thus holding to the inflexibility of commission established rates the framers of the amendment must have had in mind the principles announced in L. & N. R. Co. vs. Maxwell, 237 U. S. 94, 36 Supm. Ct. 494. In this case the Court reiterates the rule which it says in another case it has "restated with tiresome repetition:"

> "Under the Interstate Commerce Act the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more that the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has

been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination. The Act (sec. 6) provides:

> 'Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.' (34 Stat. at L. 587, Comp. Stat. 1913, sec. 8597.)''

The Wright Act, approved March 19, 1909, (Cal. Stat. 1909, p. 499) forbade a transportation company to engage in transportation without filing and publishing its tariffs in accordance with the provisions of the Act, and denied it the right to charge or demand or collect or receive a greater or less compensation that its tariff rates (Sec. 18). This was superceded by the Eshleman Act, effective Feb. 19, 1911, (Chap. 20, Stat. 1911) which in Sec. 17 pro-

vided for the establishment of rates, and in Sec. 18 provided that such rates should remain in effect until changed by the Commission, and in Sec. 22 provided that no railroad company should charge, etc., any greater, less or different rate than the rate established by the Commission.

The California Public Utilities Act, effective March 23, 1912, (Chap. 14, Stat. Special Session 1911) denied by Sec. 17 the right of a carrier to charge, demand, etc., any greater or less or different compensation than the rates specified in the published schedules.)

What was the reason for this I have termed a rather remarkable inclusion of a statute in a constitutional amendment? The reason, in brief, was this: The Legislature of California at the same time it submitted these two amendments to the people for ratification, submitted initiative and referendum amendments. If the initiative and referendum amendments were adopted, as they were, at the same election, the Legislature saw that there was a hiatus there between the adoption of the constitutional amendment, changing in many respects the scheme of rate regulation, and the time when the Legislature could meet, and put a new and amplified act into effect. As a matter of fact the new act which is referred to in the briefs did not go into effect until March 23, 1912, and so they state in effect in the amendment "we do not propose that

if this amendment is adopted these carriers shall be allowed to be foot loose; we do not propose that they shall be without regulation even for a month or two months; we propose that this Eshelman Act shall remain not as an Act of the Legislature, but as a part of the organic law of this State; we propose to hold that Act in effect until the Legislature gives us something different, and we hope, something better." So I say in reading the provisions of the Eshleman Act it is proper to read them not as an Act of the Legislature, but as an integral part of the Constitution itself, and so reading, the provisions, of course, must be read in *pari materia.*

The Supreme Court of the United States has said to a somewhat similar contention to that of counsel here and in United States vs. Louisville & N. R. Co., 235 U. S. 314:

> "It has indeed been held that the provisions of sections 2, 3 and 4 of the Act being in pari materia required harmonious construction, and therefore they should not be applied so that one section destroyed the others and consequently that a lesser charge for a longer than for a shorter distance permited by section 4 could not for such reason be held to be either a preference or discrimination under section 2 or 3."

Now there is a further reason, if your honors please, why this Eshleman Act, holding as I have shown in section 18 that the rates established by the commission, should continue in effect, until changed by the commission, shall have been so included in the constitutional enactment, and that reason is a practical reason, and one which of necessity must have appealed to the Legislature. That reason is, that to have done otherwise would have thrown the rate structure of the railroads of California into utter chaos. There were hundreds, yes, thousands of cases in California at that time where the railroad commission had established rates and approved tariffs which violated the old long and short haul clause of the California constitution. Counsel says in his briefs, and at least would say in his argument if he was called upon to discuss that point that the rates established by the commission under the old section of the constitution so far as they related to through movement were legally established, but that so far as they permitted the charging of higher intermediate rates, they were not permitted by the constitution and were, therefore, void. What would be the result? Let us take a concrete illustration. The rate on rice established by the commission prior to October 10, 1911, as shown by the record in this case, was, I think, 27½ cents per hundred pounds from San Francisco to Los Angeles. The rate on rice to

Fresno was, I believe 38 cents per hundred pounds, at least, it was more than the through rate. It was an apparent violation of the old long and short haul clause, if you take it as an isolated clause under the old constitution, and do not construe it in pari materia with the other clauses. What was the result, according to counsel's contention? October 10th comes along and irrespective of whether your honors may find that the 27½ cent rate and the 36 cent rate were legally established on October 10, 1911, whether you find for the railroad company or against it, on the first class of the counts in this action the fact remains that on October 10, 1911, according to counsel's own admission, there was at least one legal rate there, and that was the 27½ rate to Los Angeles, which we claim is compelled by competitive conditions. Counsel says that rate should be observed as a maximum to intermediate points. Think what utter confusion would result if at one fell swoop by a constitutional enactment all of the intermediate rates, no matter whether carrier made or commission made, are wiped out, and the carrier was told under the constitutional provision to charge the through rate, but no more, to any of its intermediate points. Could it be that the Legislature in submitting this to the people contemplated any such condition of affairs? Any such condition that would inevitably disrupt traffic and business conditions and make it impossible for a

shipper or a receiver of freight to tell what the railroad in its sweet will would charge him at any intermediate point between San Francisco and Los Angeles.

It is true, as we suggest in our supplemental brief, and as counsel refers to in his supplemental brief that if the railroad without commission authority charged John Smith more for transporting rice from San Francisco to Fresno than it charges James Brown it would be guilty of discrimination under the Eshleman Act. That is perfectly true, but is that an answer? Can it be said that the Legislature in submitting this amendment to the people, or that the people in adopting this amendment could have contemplated that the railroad, subject only to the penalties prescribed in the Act, might discriminate, might charge one man 28 cents for rice to Fresno, another man 25 cents, another 24 cents and another 15 cents, so long as it did not exceed the 27½ cents rate? That is what counsel's argument inevitably leads to. It goes to the point that the through rates established by the commission and in effect on October 10, 1911, were reasonable, but that the intermediate rates were void in so far as they exceeded the through rate.

I say the Legislature in adopting the provisions of the Eshleman Act, which provided that all rates of charges for transportation of freight and passengers should remain in effect until changed by the commission designedly intended to preserve the

status quo. They did not intend, of course, indefinitely to permit the carriers where unjustified circumstances existed to defy the principle established by the long and short haul clause, but they did intend to give the commission the opportunity of adjusting whatever difference might be called to its attention.

The commission did act in this matter as counsel admits, but he argues in his brief that the action of the commission was not effective action. He predicates that first on the language of the orders entered by the commission, and second on the language of the constitution itself. Now, the amendment to the constitution says that this long and short haul clause shall be operative except in special cases and upon application and after investigation by the commission; and for the moment I wish to devote my attention and that of the court, to the question of what "investigation" means as used in the statute. On page 113, 114 and 115 of our opening brief we cite a number of cases to the point that investigation as used in a statute of this kind does not require the formality and solemnity of a court of record, that while a commission may have judicial powers that the term "investigation" is not as broad as the term "hearing." There are no adversary parties in an investigation of that kind because the commission is sitting, presumably, as representing the shippers and the people. It is not an ad-

versary proceedng. I find in addition to those authorities some considerable support for that position. Section 17 of the Act to regulate commerce provides that the commission may conduct its proceedings in such manner as will best tend to a proper discharge of business, and to the interests of justice. In New York C. & H. R. R. Co. vs. ICC, 168 Fed. 131, 138, 139, and in Philadelphia and Reading Ry. Co. vs. United States, 219 Fed. 988, this provision of the Interstate Commerce Act is discussed. I will not take the time of the court to read the cases, but I think they sustain my view, that the word "investigation" means not a public hearing, but any investigation which the commission may see fit to make precedent to a relieving order, especially in cases where no notice is necessary and there are no adversary parties, notice having been waived by the carrier by filing the application, and no notice to any one else being necessary.

But these orders to which I shall very shortly refer were made while the Eshleman Act was in effect. That Act, as I have shown, was not only an Act of the Legislature but had been adopted bodily by the State Constitution, the construction of that adoption having been passed upon by the Supreme Court of California in the telephone case, I have cited here. The Eshleman Act, Chapter 20, Statutes of 1911, on page 13, requires the establishment of rates and a hearing only when the rate or

classification is abolished, altered or in any way amended, because under section 15 the commission is given the power to establish rates and charges for the transportation of freight. I suppose the necessary qualification would exist there, that that power cannot transcend Federal constitution limitations. That is involved in another branch of the case which is covered by the briefs, and I do not care to confuse this argument by further referring to it.

Section 17 of the Eshleman Act provides that a substantial compliance by the commission with the requirements of the Act shall be sufficient to give effect to all of its orders, and that none of them shall be declared inoperative because of any omission of a technical or clerical character in the establishment, record or publication of the same.

The commission on October 26, 1911, when the news of the adoption of the amendment became authentic directed an order to the carriers, which your honors will find beginning on page 399 of Volume 2 of the printed record. This order directed the carriers before January 2, 1912 to present to the commission for examination and investigation a new schedule or schedules removing deviation from the provisions of the long and short haul clause. Following that on November 20, 1911, the commssion issued another order in which it said—this will be found on page 404 of Volume 2 of the printed record:

"Permission is hereby granted to railroads and other transportation companies until January 2nd, 1912, to file for establishment with the commission in the manner prescribed by law and in accordance with the commission's regulations, such changes in rates and fares as would occur in the ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points; provided, that in so doing the discrimination against intermediate points is not made greater than that in existence October 10th, 1911, except when a longer line or route desires to reduce rates or fares to the more distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the shorter line."

Then the commission says that it does not hereby indicate it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rates to intermediate points, all of which rates and fares will be investigated at the hearing to be held January 2nd, 1912. The intention of the commission with respect to this order is clearly set forth in its opinion in the Phoenix Milling Co. case, copy of which is printed herewith.

Now, between that date and January 2nd, 1912, the Southern Pacific Company filed with the commission certain formal applications verified and in the form prescribed by the commission in its order of October 21, 1912. This series of applications begins at page 407, Volume 2 of the printed record, and covers all of the second class of counts here involved.

On January 2nd, 1912, a hearing was had. No evidence was introduced at the hearing. That appears from the record. It was simply continued. On January 16th, 1912, the commission made another order, which appears on page 425 of Volume 2 of the printed record:

> "Until February 15, 1912, the railroad and other transportation companies may file for establishment with the commission in the manner prescribed by law and in accordance with the commission's regulations such changes in rates and fares as would occur in the ordinary course of their business, continuing under the present rate bases or adjustments, higher rates or fares at intermediate points."

We claim for this series of orders two things. We claim, first, that under the power vested in the commission by the Eshleman Act, which provides that it can fix a rate without a hearing whenever it does not change or abolish or alter the rate, these orders operated as rate fixing orders, and that of

necessity that is so because it carries out the scheme and plan of the Legislature to preserve the status quo of commercial conditions and railroad rates in California, pending the time when the commission might investigate and pass upon these thousands and thousands of rates violative of the long and short haul clause.

We claim in the second place that these orders, particularly the order of January 16, 1912, because that order came after the applications had been made by the company, that either or both of these orders operated as a permission by the commission to continue the existing discrimination, if you care to call it such, or the existing conditions under which we were charging more for the shorter than for the longer distance.

Referring again to the Phoenix Milling Company case and referring again to the proposition that this commission is a judicial body, that its powers within its jurisdiction are almost co-equal with those of the Supreme Court, I desire to call attention to what the commission itself determined in the Phoenix Milling Company case.

> "The commission's order of October 28, 1911, in the long and short haul proceeding issued under authority of section 21, Article XII, of the Constitution as amended on October 10, 1911, and in pursuance of which the defend-

> ant's application was filed, directed the carriers to remove all violations of the long and short haul provisions then existing, or in the event it was desired to justify the same or any of such violations, to file applications specifying the particular violations they desired to continue. By this order the carriers were impliedly granted permission for practical reasons to maintain the status quo until the commission passed upon their application. By a subsequent order issued November 20, 1911, in the same proceedings *express permission so to do was given.*

I respectfully submit to your honors that if you were sitting in the position of those commissioners, and realized the consequences which would result, which I have inadequately endeavored to depict here, by wiping out at once all of the intermediate rates in the state which violated the long and short haul provisions, and turning the carriers loose to do as they pleased with regard to those intermediate rates, subject only to the penalties for discrimination, I feel in respect for the court and its judgment your honors would have done exactly the same thing as the commission did, and believed it could do, preserve the status until the commission could investigate these thousands of rates and avoid disturbing business conditions, and allowing the situation to arise which we have here.

Counsel complains in his supplemental brief that his clients, California Adjustment Company were not notified with regard to any of the proceedings. I do not conceive that it is any more incumbent upon the California Railroad Commission to notify every collection corporation in the State—I do not use the term in any offensive sense—any more than it is upon this court to call upon counsel to file briefs as amicus curiae. The proceeding, as I have said, is not what we commonly term an adversary proceeding. It is vested in the commission as such to represent the shippers and receivers of freight. We find they do take that stand, sitting partly as a judge partly as an advocate, partly as a jury, and sometimes as executioner so when the carriers filed an application, and the matter came before the commission there was no necessity for going out into the highways and byways and calling in every one and making an adversary proceeding out of that is delegated to the discretion of the commission.

I feel that upon this second branch of the case I have already too long trespassed upon your honors' patience, but I feel as I said in the beginning, that in the mass of briefs filed it may be that the proposition has been lost sight of, that this constitutional amendment adopted the act bodily and that the only way you can give that amendment proper effect is to take the amendment and the act and construe them together, trying to find out what the Legislature

really intended and tried to do, for when we find out what the evils are against which the legislation is directed, we can usually find the intention of the Legislature.

(Then followed oral argument by counsel for defendant in error.)

NOTE.

As this, by permission of the Court, is in effect though not in form, a supplemental brief, we desire briefly to comment on the closing argument of counsel for defendant in error, made May 24, 1916.

1st—We are content to leave the question of whether it is necessary to plead and prove damages, which counsel denies, to the cases cited in the briefs and oral arguments.

2nd—Counsel does not answer our argument to the effect that the Legislature, by making the Esh-leman Act a part of the Constitution, intended to prevent the business confusion and chaos of common-carrier rates which would have resulted on October 10, 1911, if the carriers had immediately been allowed to charge anything they pleased for the intermediate rate, so long as they did not exceed the through rate established by the Commission and already in effect.

3rd—Counsel referred in his argument to the case of Merchants & Manufacturers Traffic Association of Sacramento et al vs. United States et al, District

Court, Northern District of California, Second Division, decided December 15, 1915, reported in 231 Fed., beginning at page 292, in which, by a divided Court, it was held that the Interstate Commerce Commission had not given certain Long and Short Haul Clause applications the investigation required by the amendment of June 18, 1910, to the Fourth Section of the Interstate Commerce Act. We beg to call the Court's attention to the fact that in that case the United States Supreme Court granted a writ of supersedeas in April, 1916, and that the issues there involved are now before that Court for determination. Counsel is in error when he states that there was no difference of opinion among counsel, and no question, so far as the regularity of the Commission's investigation was concerned. That is one of the main questions in the case, and to the writer's knowledge is one of the questions which was relied upon by counsel for the Interstate Commerce Commission and for the railroad carriers in presenting their application to the Supreme Court in April for a writ of supersedeas.

4th—Counsel's illustration of what would happen if a carrier started in business after October 10, 1911, and endeavored to make greater charges for the shorter than for the longer distance, is we think rather unfortunate for his contention here. It is clear that under the provisions of the amended Constitution and the Eshleman Act, which was made

a part of the Constitutional amendment the carrier should not engage in business at all without having its rates fixed by the Commission. The Commission might do so under the Act, *sua sponte,* and the rates so established would be the actual moving rates of the carrier, subject only to the right of the carrier to complain that they deprived it of property without due process of law, or violated some other provision of the Federal Constitution; or the carrier might, as it probably would in the case supposed by counsel, go to the Commission with a schedule of rates which it thought was reasonable and just, and ask the Commission to adopt those rates, or such modification thereof as the Commission might think proper.

Manifestly it could not be contended in either of these events that if the Commission, either of its own volition or upon application of the carrier, fixed rates for the carrier newly engaging in business, which rates violated the Long and Short Haul Clause, a right for reparation or damages would arise on behalf of persons who were charged more for the lesser than for the greater distance, merely because the carrier had not made application stating that the case was a special case, and because the Commission had not, after investigating that special case with all the formality of a Court investigation, granted relief from the operation of the clause.

In other words, the fixing of the new rates by the Commission would in itself presuppose an investigation by the Commission, since with the Commission is lodged abundant information in the shape of tariffs, schedules, etc., by which it can determine whether to exercise its discretion in a given case. The Commission is the representative of the public, and if the carrier does not complain the public cannot complain. This principle, as we have stated a number of times in briefs and oral arguments, is one of the principles upon which the orders of the Commission entered after October 10, 1911, preserving the status quo, may be sustained as rate-fixing orders under the provisions of the Eshleman Act giving the Commission the power to fix rates without a hearing, and requiring a hearing only where a rate is changed, altered or amended, irrespective of what effect may be given them as exercise of a power solely referable to the long and short haul section.

5th—We ask the Court not to lose sight of the fact that as to all of these counts it was pleaded in the first further and separate defense (Record, Vol. II, p. 337-8) that to force collection of the through rate at the intermediate point would be to require defendant to establish such intermediate rates at less than a reasonable compensation for the services performed, and in the eleventh further and separate defense that the rates charged and collected were just and reasonable.

To these defenses general demurrers were sustained (Record, Vol. II, p. 356). The Court refused to permit testimony thereon (Record, Vol. II, p. 448). Error is duly assigned as to the sustaining of the demurrer (Record, Vol. II, p. 453) and as to the rejection of the testimony (Record, Vol. II, p. 531).

In this the District Court, we think, was clearly in error.

The case is one of attacking what is claimed to be an attempt by the State to single out certain limited classes of freight and compel them to be carried for unremunerative or less than reasonable rates.

If it be true that the inflexible operation of the long and short haul clause before October 10, 1911, or its automatic operation on that date, had that effect we think that defendant was entitled to show it.

The following cases are authority:

Northern Pacific vs. North Dakota, 236 U. S. 585; 35 Supm. Ct. 429:

"But a different question arises when the state has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or without substantial compensation, even though the entire traffic to which the rate is applied is taken into account.

On that fact being satisfactorily established, the presumption of reasonableness is rebutted. If in such a case there exists any practice, or what may be taken to be (broadly speaking) a standard of rates with respect to that traffic, in the light of which it is insisted that the rate should still be regarded as reasonable, that should be made to appear. As has been said, it does not appear here. Frequently, attacks upon state rates have raised the question as to the profitableness of the entire intrastate business under the state requirements. But the decisions in this class of cases furnish no ground for saying that the state may set apart a commodity or a special class of traffic and impose upon it any rate it pleases, provided only that the return from the entire intrastate business is adequate.

* * * * *

"To repeat and conclude: It is presumed—but the presumption is a rebuttable one—that the rates which the state fixes for intrastate traffic are reasonable and just. When the question is as to the profitableness of the intrastate business as a whole under a general scheme of rates, the carrier must satisfactorily prove the fair value of the property employed in its intrastate business, and show that it has been denied a fair return upon that value. With respect to particular rates, it is recognized that

there is a wide field of legislative discretion, permitting variety and classification, and hence the mere details of what appears to be a reasonable scheme of rates, or a tariff or schedule affording substantial compensation, are not subject to judicial review. But this legislative power cannot be regarded as being without limit. The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service after taking into account the entire traffic to which the rate applies, it must be concluded that the state has exceeded its authority."

The companion case to Northern Pacific vs. North Dakota is Norfolk & Western vs. Conley, Attorney-General of West Vrginia, 236 U. S. 605; 35 Supm. Ct. 437:

"The fundamental question presented is whether the validity of the passenger rate can be determined by its effect upon the passenger business of the company, separately considered.

What has been said in the opinion in Northern Pacific R. Co. vs. North Dakota, decided this day (236 U. S. 585, 59 L. Ed. 429, 35 Supm. Ct. 429), makes an extended discussion of this question unnecessary. It was recognized that the state has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of services. It was further held that, despite this range of permissible action, the state has no arbitrary power over rates; that the devotion of the property of the carrier to public use is qualified by the condition of the carrier's undertaking that its services are to be performed for reasonable reward; and that the state may not select a commodity or class of traffic, and instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost, or for a compensation that is merely nominal."

Respectfully submitted,

HENLEY C. BOOTH,
GEORGE D. SQUIRES,
FRANK B. AUSTIN,
Attorneys for Plaintiff in Error.

SUPPLEMENT.

NOTE. The following is a copy of a certified copy of the decision of the California Railroad Commission in the Phoenix Milling Company case, referred to in the oral argument, the certified copy being filed with the original of this brief.

The reason for filing the certified copy is that in the printed copies that came out of the State Printer's office the order of the Commission of November 20, 1911, was referred to as November 20, 1912. The typographical error has been corrected n the Commission's office, as will appear from the certified copy herewith.

Before the Railroad Commission of the State of California.

Phoenix Milling Company vs. Southern Pacific Company. Case No. 762. Decided July 23, 1915.

George J. Bradley, for Complainant.
George D. Squires, for Defendant.

REPORT OF THE COMMISSION.

LOVELAND, *Commissioner.*

The complainant in this proceeding is a corporation engaged in the handling of grain, meal and flour, and its principal place of business is at Sacramento. In its petition filed January 25, 1915, the complainant alleges that during the period from December 6, 1912, to February 24, 1914, there was shipped to it at Sacramento via defendant's line certain less-than-carload shipments of meal from San Francisco, on which there was charged and collected by defendant a rate of 16 cents per 100 pounds which was the fourth class rate then applying between San Francisco and Sacramento and which is still in effect. The complainant further alleges that at the time these shipments were made the defendant published and maintained a commodity rate of 13 cents per 100 pounds on meal in less-than-carload lots from San Francisco to Perkins, a point beyond Sac-

ramento on defendant's Placerville branch, and the complainant contends that the charging of a higher rate to Sacramento than was contemporaneously in effect to Perkins subjected it to an undue discrimination and was in violation of the provisions of the Constitution and the Public Utilities Act prohibiting a greater charge for the transportation of property for a shorter than for a longer distance over the same line or route in the same direction. Reparation in the sum of $8.17 is asked, together with interest from the date of its collection.

While it is admitted by the defendant that the rates alleged to have been charged were in violation of the long and short haul provision of the Constitution it avers that prior to the time of the movement of the alleged shipments that it had made application to the Commission, in pursuance to the provisions of section 21 of article XII of the Constitution empowering the Commission upon application and in special cases after investigation to grant authority to deviate from the long and short haul rule, for a waiver of said provisions as to the rates from San Francisco to Perkins and other points on the Placerville branch, and that until that application was acted upon by the Commission the defendant was protected in its violation of that provision and that reparation should not be

awarded therefor. This is true in part, but only in part, for the reason that while this Commission, under its order of November 20, 1912, gave carriers permission to maintain the *status quo* existing at the time the Constitution was amended following the procedure of the Interstate Commerce Commission in similar matters, for practical reasons no guarantee was extended to the defendant by either the provisions of the Constitution or by order of this Commission that it would be excused for violating the long and short haul rule if, upon investigation, such deviation was not found reasonable or permissible.

Defendant denies that this complainant received the shipments alleged to have been received by it, or that it paid the freight charges thereon, or any part thereof, or that any of the rates mentioned in the complaint discriminated against complainant, or that complainant was damaged by the payment of freight charges alleged, or is entitled to an award of reparation.

Defendant's denial that complainant made the shipments alleged to have been made need not be considered seriously, as it was probably made on account of lack of information, and no testimony was offered at the hearing in support of such denial, whereas counsel for complainant at the hearing introduced a statement

of shipments and stated that complainant had, in his possession, the paid freight bills as evidence that these shipments were made and the freight charges collected.

The questions whether the rates mentioned in the complaint discriminated against the complainant or whether complainant was damaged by the payment of freight charges alleged, and was consequently entitled to an award or reparation, are the questions which the Commission is called upon to decide in this case.

The rate of 13 cents per 100 pounds on meal in less-than-carload lots from San Francisco to Perkins was originally published and filed in so far as the record of the Commission indicates, in defendant's Placerville Commodity Tariff No. 1, C. R. C. 113, which became effective on August 28, 1906, and was continued in effect in that or other publications as a non-intermediate rate until April 12, 1914, on which date it was made to apply as a maximum to intermediate points. During the entire period from December 6, 1912, to April 12, 1914, there was no commodity rate on meal in less-than-carload lots from San Francisco to Sacramento, and the class rate applying thereon was 16 cents per 100 pounds. Therefore, during the period in which it is alleged the shipments herein involved were made and until April 12, 1914, the rate from San Francisco to Sacramento, as

compared with the rate from San Francisco to Perkins, was in violation of the long and short haul provision prohibiting the charging of a greater rate for a shorter than for a longer haul over the same line or route in the same direction. The record also discloses that the defendant, in pursuance to an order of the Commission issued on October 26, 1911, in Case 214, the long and short haul nvestigation, filed with this Commission on December 30, 1911, an application (Southern Pacific No. 59 in Case 214) asking authority generally to continue rates for the transportation of property from San Francisco to Perkins and points on the Placerville branch, as shown in its Placerville Commodity Tariff No. 1, C. R. C. No. 113, lower than the rates concurrently in effect from or to intermediate points. While the rate on meal to Perkins was not specifically mentioned or Sacramento specified in the application as an intermediate point to which it desired to continue a higher rate on meal than it concurrently maintained to Perkins, the terms of the application were general and the illustrations therein set out were merely typical of the general adjustments of rates from San Francisco to points on the Placerville branch as to which it sought authority to disregard the long and short haul rule. Thus the application provided that the illustrations therein set out

"outlines in a general way the adjustment of rates covered by tariff C. R. C. No. 13 and is in the nature of an explanation of the general features where rates do not conform to section 21, artcle XII of the Constitution of California as amended October 10, 1911";

also that

"there are instances other than those specifically mentioned in this petition in which the charges are greater in the aggregate for the transportation of like kinds of property for the shorter than for the longer distance over the same line or road in the same direction, the shorter being included within the longer distance but it is not practicable to state them all in detail in this petition and it is the desire of your petitioner to continue such rates in force as in said tariff provided reference hereby being made to said tariff for further details and particulars as to said rates."

In vew of the terms of the application it is my opinion that it should be construed as a general application for relief from the long and short haul provision of the Constitution as to *all* rates in defendant's so-called Placerville Commodity Tariff C. R. C. No. 116, and which included the less-than-carload rate on meal from San Francisco to Perkins.

In defense of this adjustment, the Southern Pacific Company, in the long and short haul investigation, contended that the rates from San Francisco to points on the Placerville branch were made lower than the rates to intermediate points because of the competition of carriers by water operating between San Francisco and Sacramento. In the case at bar, the same justification was offered and it was also said that the competition of boat lines between San Francisco and Sacramento and teams thence to points on the Placerville branch, forced the defendant to maintain to these points lower rates than to intermediate points. While there might have been sufficient reason on these grounds for the non-observance of the long and short haul rule as to rates from San Francisco to intermediate points south of Sanramento not located on navigable waters, it is obvious that such a reason would not justify a higher rate from San Francisco to Sacramento than from San Francisco to Perkins or other points on the placerville branch, as the competition of the carriers by water, if there was any, was between San Francisco and Sacramento, and it was that very competition which was reflected to the points on the Placerville branch that induced the carrier to establish to those points lower rates than it would have established had

it not existed. This being so, there appears no reason why the rail rates from San Francisco to Sacramento should not have been as low, if not lower, than the rail rates from San Francisco to Perkins, and in my opinion, the conclusion that Sacramento was discriminated against by the adjustment is unavoidable. Nor is it seriously contended by the defendant that the maintenance of lower rates from San Francisco to points on the Placerville branch than to Sacramento was justified by the dissimilarity of the transportation conditions at the more distant points, and Mr. Butler, assistant general freight agent of defendant, stated at the hearing (see transcript, page 19) that he did not defend the Placerville tariff and the fact that defendant, on April 12, 1914, canceled the non-intermediate application of the rate to Perkins shows that defendant agrees with the Commission in this view.

As to team competition from Sacramento to points on the Placerville branch, which probably did exist at one time, owing to the fact that teams came into Sacramento loaded and would be willing to take a load back, it was not seriously urged that such competition now exists, and even if there were such competition today, it would seem to justify a lower rate

from Sacramento to Perkins on shipments originating at Sacramento as well as on shipments originating at San Francisco.

The complaint made no showing that the rates charged were unreasonable *per se* or discriminatory in any other respect than that they were violative of the long and short haul.

There is no doubt in my mind that such rates violated the long and short haul and kere discriminatory under that rule.

The Commission's order of October 26, 1911, in the long and short haul proceedings (Case 215) issued under authority of section 21, article XII of the Constitution as amended on October 10, 1911, and in pursuance to which the defendant's application was filed, directed the carriers to remove all violations of the long and short haul provisions then existing or in the event it was desired to justify the same or any of such violations, to file applications specifying the particular violations they desired to continue. By this order the carriers were impliedly granted permission for practical reasons, to maintain the *status quo* until the Commission passed upon such application. By a subsequent order issued on November 20, 1911, in the same proceeding, express permission to do so was given. The Commission did not, however, by these orders sanction or approve any of the rates

covered by the defendant's application which were in violation of the long and short haul provision. In fact, it expressly withheld its approval of such rates. Therefore, in my opinion, the filing of the application for relief from the long and short haul provision and the permission of the Commission to maintain the *status quo* did not operate to extend to the carrier immunity from reparation during the pendency of said application if the higher rates charged to the intermediate points were thereafter found to be unreasonable or discriminatory and if, in the Commission's opinion, reparation was due. In this respect the rates covered by the application were no different from rates filed in tariffs and which are subject to complaint and the Commissions' power to award reparation.

On April 12, 1914, the defendant made the rate to Perkins applicable to all intermediate points and thereby presumptively established that rate as a just and reasonable rate to Sacramento. This resulted in a discontinuance of the deviation from the long and short haul rule and removed the discrimination theretofore appearing in the rates complained of. The question for the Commission to decide is, shall the defendant be required to pay reparation in this case?

I have no hesitation in declaring my conviction that reparation should be awarded where complainants can show that the application of rates, violative of the long and short haul rule, has resulted in damage to complainants. I do not believe that the carriers should be required to pay reparation to a complainant who has not been damaged when it is evident that such reparation can not be passed on to those who are entitled to it, but rather, that compalainant will keep it as additional profit.

There may be instances where complainants will be able to show that their selling prices, in cases of this kind, were not based upon cost and carriage, but were directly affected by competition from points enjoying rates violative of the long and short haul rule. In such cases it may be possible to show damage and that reparation should be awarded. In the case at bar no testimony was offered to show that the rate from San Francisco to Perkins, discriminatory as it clearly was when compared with the rate from San Francisco to Sacramento, and violating the long and short haul rule as it did, had any effect upon the price made by complainant in selling his merchandise to customers in Perkins, and it is therefore fair to assume that complainant based his selling price upon cost and carriage and made his profit, in which event reparation, if due to any

one, is due to the people to whom complainant sold his wares and they, in turn, in equity should pass it on to those to whom they sold the merchandise. Such is, of course, impossible, and the state is put to the expense of putting the machinery of this Commission in motion to collect petty reparation from the carciers who are not entitled to retain it, or see that it is paid to shippers as clearly not entitled to it, often under circumstances which indicate that such claims for reparation would never have been filed had it not been for the activities of claim agents who usually receive 50 per cent of the amount recovered, while the consumer, to whom the reparation is due in the last analysis, gets nothing. I do not believe that such was the aim or intent of the law. Undue discrimination must be removed wherever and whenever found; deviation from the long and short haul rule must be justified or discontinued; reparation should be awarded where damage is shown, but I do not believe the time of this Commission should be occupied to the neglect of more important matters in helping to collect reparation for people not entitled to it.

The criticism as to the manner in which such claims are some times brought does not apply to this case, which was instituted by Mr. Bradley, who is regularly employed by the

members of a large and important association to look after their interests, and if complainant in this case can show that his selling price was not based upon cost and freight, and that he was damaged, he should be allowed to do so, and reparation awarded for damages shown.

The conclusions herein reached are in accord with the opinion of the Interstate Commerce Commission in Appalachia Lumber Co. vs. L. & N. R. R. Co., 25 I. C. C. 193. In that case the Commission said:

> "It would be inconsistent to grant reparation for a disregard of the rule of the fourth section during that period within which the law making authority had expressly sanction existence of such disregard."

And that

> "No damages can be given up to the time when the Commission passes under these fourth section applications unless possibly a case is made out under the third section which carries with it an award of damages or unless under the first section the rate to the intermediate point has been found unreasonable."

The facts in that case, however, and the provisions in section 4 of the Interstate Commerce Act are essentially different from the facts in this case and the provisions of the Public Utilities Act applicable in this proceeding. It

does not appear that the defendant in the Appalachaia case, subsequent to the filing of its application for relief from the fourth section of the Interstate Commerce Act, removed the discrmination against the intermediate points by establishing the rate to the more distant point as a maxumim to the intermediate point and thereby admitted the reasonableness of that rate for the shorter haul.

This case, like all others heard and decided by the Commission, must rest upon the peculiar statement of facts applicable to it and under all the circumstances of the case I find the application for an award of reparation must be denied.

I submit the following form of order:

ORDER.

This case being at issue upon complaint and answer duly filed, and a public hearing having been held, and the matters and things involved in the case thoroughly considered, and the Commission having found that the rate herein complained of was discriminatory and violative of the long and short haul rule, but that such discrmination had been removed, and such deviation from the long and short haul rule discontinued, and that under the circumstances of the case the application for an award of reparation should be denied.

It is hereby ordered that such application for an award for reparation be, and it is hereby, ordered, and the case dismissed without prejudice.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission.

Dated at San Francisco, California, this 22d day of July, 1915.